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No. 09-451

In the Supreme Court of the United States

TRAVIS SAULSBERRY, ET AL., PETITIONERS

v.

LORRI MYERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether officials at a detention center are entitled to qualified immunity for strip searching a woman arrested on suspicion of public intoxication and detained for several hours, even if she was held outside the jail's general population and the officials lacked reasonable suspicion that she possessed weapons or contraband.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-29a) is unreported. The opinion of the district court (Pet. App. 1a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2009. The petition for a writ of certiorari was filed on October 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Late in the evening on August 31, 2006, police at a traffic checkpoint stopped the truck in which respondent Lorri Myers and her husband Ronald were riding. Pet. App. 4a. Police administered field sobriety tests to Ronald, who was driving, and arrested him on suspicion of driving under the influence. *Id.* (He was later released without charge after breath tests indicated that he was not intoxicated. *See* Second Amendment Complaint ("Complaint") ¶¶ 35-36.) Police then administered field sobriety tests to respondent and arrested her on suspicion of public intoxication; they then took her to the LeFlore County Detention Center ("LCDC"), where petitioner Travis Saulsberry is Administrator. Pet. App. 4a, 2a. Respondent, like her husband, was not intoxicated. Complaint ¶ 37.

Early the next morning, petitioner Loretta James, a detention officer, booked respondent. Following her ordinary practice, James then ordered respondent, who was then 52, to remove all her clothes and visually inspected her naked body. Pet. App. 5a, 23a. James then had respondent shower and change within view of a male inmate working in the adjoining booking area. *Id.* at 5a-6a. James then gave respondent a jail uniform to wear. Respondent, who was menstruating, requested a tampon, but because none were available, James gave her a maxi-pad and boxer shorts. *Id.*

Mr. Myers' paid respondent's bail by 1:23 am on September 1, 2006, and police instructed LCDC to release her. But in accordance with unwritten LCDC policy to hold persons arrested for intoxication

for four hours to give them time to become sober, respondent was segregated and held, alone in a cell, until 4:50 am. She was not placed in the facility's general population. Pet. App. 7a, 24a n.1. The public intoxication charge was later dismissed. Complaint ¶ 47.

2. Respondent sued petitioners Saulsberry and James, LeFlore County ("the County"), and the LeFlore County Detention Center Public Trust ("the Trust") in federal district court under 42 U.S.C. § 1983, alleging that they had violated respondent's Fourth Amendment rights by strip-searching her and continuing to detain her after she posted bail, and violated her Eighth and Fourteenth Amendment rights by the invasive booking procedures and by providing insufficient clothing and hygienic items during her detention. Pet. App. 2a.[1] Petitioners, the Trust, and the County moved for summary judgment on all claims, and the district court granted the motion in part and denied it in part. The district court denied Saulsberry, James, and the Trust summary judgment on the Fourth Amendment claims arising from the strip search, *id.* at 15a-16a, 18a-19a, but granted the motion in all other respects. *Id.* at 11a, 14a, 17a-21a. The district court held that there were disputed issues of material fact about whether respondent was strip searched and concerning supervisory and governing-body liability for petitioners Saulsberry and the Trust. *Id.* at 15a-16a.

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[1] Respondent also brought related state-law claims that are not at issue here. Pet. App. 2a.

3. On interlocutory appeal, the court of appeals affirmed. Pet. App. 22a-29a. Noting that "[s]everal of this court's opinions have condemned strip searches in circumstances similar to this case" (*id.* at 26a-27a) over "the last two decades," the court held that "[i]t was clearly established in this circuit well before September 1, 2006 that 'a detainee who is not placed in the general prison population cannot be strip searched if the searching officer does not *at least* have reasonable suspicion that the detainee possesses concealed weapons, drugs, or contraband.'" *Id.* at 25a-26a (quoting *Archuleta v. Wagner*, 523 F.3d 1278, 1286 (10th Cir. 2008)). The court rejected petitioners' claim that the en banc Eleventh Circuit's decision in *Powell v. Barrett*, 541 F.3d 1298 (2008), demonstrated that Tenth Circuit precedent misapplied this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). The court of appeals noted that its opinions "remain binding in this circuit until the Supreme Court or the en banc circuit court overrules them," and that in any event, "[a] decision handed down in another circuit, two years after the events at issue in this case, does not undermine our conclusion that this circuit's law was clearly established in September 2006." Pet. App. 27a-28a.[2]

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[2] The court of appeals also rejected petitioner Saulsberry's argument that respondent's purported failure to prove that he had personally participated in the strip search was fatal to her section 1983 claim, stating that respondent's allegations of an "unconstitutional practice and procedure at the LCDC and for failure to train" supported the suit. Pet. App. 28a. The court also concluded that Saulsberry had forfeited that argument by failing to raise it in his opening brief. *Id.*

ARGUMENT

Petitioners contend (Pet. 7-12) that the judgment of the court of appeals conflicts with this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), and with decisions of other federal courts of appeals, (Pet. 12-16). Petitioners thus argue (Pet. 19-25) that it was not clearly established on September 1, 2006, that the Fourth Amendment prohibits strip-searching persons arrested for minor offenses and detained outside a jail's general population absent reasonable suspicion that they possess weapons or contraband.

Those arguments are meritless. The court of appeals correctly determined that petitioners violated respondent's clearly established rights when they subjected her to an intrusive strip search while detaining her for a minor offense without reasonable suspicion that she possessed weapons or contraband. Adopting petitioners' view of the law would mean that any member of the public could be strip-searched for such trivial traffic offenses as failing to place a seat belt on children riding in cars. *See generally Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). The judgment below conflicts with no decision of this Court or any other court of appeals.[3]

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[3] Petitioner Saulsberry renews his contention (Pet. 25-26) that he is entitled to qualified immunity because he was not "personally involved" in searching respondent. Petitioner James testified, however, that "she performed a strip search of this sort for all bookings into LCDC," Pet. App. 5a, which supports the conclusion that the search was performed pursuant to an official policy for which LCDC administrators such as Saulsberry bear responsibility. As the court of appeals correctly concluded, *id.* at 28a, respondent's claims that

No further review of the court of appeals' interlocutory decision is warranted.[4]

1. An official conducting a search is entitled to qualified immunity "where clearly established law does not show that the search violated the Fourth Amendment. This inquiry turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson v. Callahan*, 129 S. Ct. 808, 822 (2009) (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (citation omitted)).

a. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons * * * against unreasonable searches and seizures[] shall not be violated." U.S. Const. amend. IV. In *Bell v. Wolfish*, this Court addressed the constitutionality of a

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Saulsberry "is responsible for an unconstitutional practice and procedure at the LCDC and for failure to train" support liability. *See generally City of Canton v. Harris*, 489 U.S. 378 (1989) (holding that inadequate training reflecting deliberate indifference to constitutional rights supports section 1983 municipal liability); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (holding that municipality may be liable under section 1983 for unconstitutional policy). In any event, the issue is not properly before the Court, because it was not properly presented to the court of appeals or resolved below, Pet. App. 28a. *See generally Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1122-23 (2009).

[4] Although this Court has discretion to entertain a petition for a writ of certiorari seeking interlocutory review of a decision denying qualified immunity, *see Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007), it is well established that interlocutory review as a general matter is disfavored and is "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

blanket policy of requiring inmates at New York's federal Metropolitan Correctional Center to "expose their body cavities for visual inspection as part of a strip search conducted after every contact visit with a person from outside the institution." 441 U.S. at 558. The Court held that determining the reasonableness of a strip search of a detainee "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559. A straightforward application of that balancing test demonstrates that the strip search of respondent was plainly unreasonable.

"There can be no doubt that a strip search is an invasion of personal rights of the first magnitude," a procedure that is "'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.'" *Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993) (quoting *Mary Beth G. v. City of Chicago*, 723 F.3d 1263, 1272 (7th Cir. 1983)); *accord Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985) (such searches are "intrusive, depersonalizing, and distasteful"). Such a grave intrusion cannot be justified here by any valid need based on security considerations. Respondent, a law-abiding 52-year-old woman, was arrested in the company of her husband for a minor offense—public intoxication—not commonly associated with possession of weapons or contraband, *see Mary Beth G.*, 723 F.2d at 1273 ("traffic or other minor offenses" do not "give rise to a

reasonable belief" that the person arrested is concealing weapons or contraband); *Jones v. Edwards*, 770 F.2d at 741 (minor traffic violations are "not associated with weapons or contraband"). Nor have petitioners cited any facts surrounding respondent's arrest to suggest she may have hidden items on her body. Moreover, at no point was respondent placed in the LCDC's general population, Pet. App. 26a, such that her search might be justified by an interest in keeping weapons or contraband out of the hands of the suspected criminals detained there. Rather, she was segregated from the general population and detained—alone—in an area reserved for temporarily holding persons arrested for intoxication until they become sober.

For nearly thirty years, courts have held jail officials liable for strip searching persons arrested for minor offenses unless there is reasonable suspicion they are concealing weapons or contraband on their bodies. Their analysis is directly relevant here:

> [The arrestee's] strip search bore no * * * discernible relationship to security needs at the Detention Center that, when balanced against the ultimate invasion of personal rights involved, it could reasonably be thought justified. At no time would [the arrestee] * * * be intermingled with the general jail population; her offense, though not a minor traffic offense, was nevertheless one not commonly associated by its very nature with the possession of weapons or contraband; there

> was no cause in her specific case to believe that she might possess either * * *. An indiscriminate strip search policy routinely applied to detainees such as [her] along with all other detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security consideration[s].

Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984) (quoting *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982)). A similar analysis compels the conclusion that the strip-search of respondent violated her Fourth Amendment rights.

b. Petitioners' actions were clearly unconstitutional on September 1, 2006. By that time, the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits, and district courts within the Third and District of Columbia Circuits, had concluded that a blanket policy of strip searching persons arrested for minor offenses being held pending bail violates the Fourth Amendment absent reasonable suspicion to believe they are concealing weapons or contraband.[5]

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[5] *See, e.g.*, *Miller v. Kennebec County*, 219 F.3d 8 (1st Cir. 2000); *Weber v. Dell*, 804 F.2d 796, 801-02 (2d Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); *Logan*, 660 F.2d at 1013; *Stewart v. Lubbock County, TX*, 767 F.2d 153, 156-67 (5th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989); *Jones v. Edwards*, 770 F.2d at 742; *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984) (per curiam), *cert. denied*, 471 U.S. 1053 (1985), *overruled in part on another ground by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc); *Cottrell v. Kaysville City, Utah*, 994 F.2d 730, 735 (10th Cir. 1993)

Petitioners identify no relevant contrary authority. As the Tenth Circuit concluded in 1993, "[e]very circuit court" which has considered the constitutionality of a blanket policy of strip-searching even persons arrested for minor offenses "under the *Wolfish* balancing test has concluded that a search under these circumstances is unconstitutional." *Chapman*, 989 F.2d at 395. Indeed, several courts of appeals concluded *during the 1980s* that the law was sufficiently well established to defeat qualified immunity.[6]

(officials liable for strip searching person arrested for driving under the influence given minor offense and fact that she was not placed in the general jail population); *Hill*, 735 F.2d at 394; *Helton v. United States*, 191 F. Supp. 2d 179, 184-85 (D.D.C. 2002) (permitting suit to proceed under Federal Tort Claims Act; noting that "[m]ost federal courts of appeals have ruled—some dating back over two decades—that strip searches of individuals arrested for minor offenses violate the Fourth Amendment unless the individual is reasonably suspected of concealing weapons, drugs, or other contraband."); *Ernst v. Borough of Ft. Lee*, 739 F. Supp. 220, 224 (D.N.J. 1990); *see also Mary Beth G.*, 723 F.2d at 1273 (holding it unconstitutional to perform strip searches, including visual body cavity inspection, of persons arrested for minor offenses).

[6] *See Walsh v. Franco*, 849 F.2d 66, 69 (2d Cir. 1988) ("[T]he unconstitutionality of a blanket policy calling for strip searches of all misdemeanor arrestees was clearly established."); *Weber v. Dell*, 804 F.2d at 801-02 (noting "ten opinions from seven circuits that succeeded *Wolfish* and refused to condone strip/body cavity searches of *all* arrestees entering a jail") (internal quotation marks omitted); *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) ("the law was sufficiently clear in early 1981 so as to expose a public official who unreasonably authorized blanket strip searches of minor offense arrestees to civil liability under 42 U.S.C. § 1983"), *cert. denied*, 483 U.S. 1020 (1987); *see also Jones v. Edwards*, 770

c. Petitioners contend (Pet. 12-21) that the Eleventh Circuit's recent decision in *Powell v. Barrett*, 541 F.3d 1298, 1310 (11th Cir. 2008) (en banc), suggests that the law governing searches of detainees is sufficiently unclear that they are entitled to qualified immunity. But *Powell* did not diminish the clarity of the law in any respect relevant to this case. While the Eleventh Circuit in September 2008 concluded that the Fourth Amendment permits searches of arrestees without reasonable suspicion regardless of the seriousness of the underlying offense, *see id.* at 1310, the *Powell* court took pains to emphasize that it was considering only the reasonableness of suspicionless strip searches "as part of the process of booking [arrestees] *into the general population* of a detention facility." *Id.* at 1300 (emphasis added); *see also id.* (same); *id.* at 1301 (same); *id.* at 1302 (same); *id.* at 1311 (same). But it is undisputed that respondent was never introduced into the LCDC's general population. Pet. App. 26a. The Eleventh Circuit did not consider the distinct question of strip-searching someone before detaining them *outside* the general jail population, much less the propriety of such a search for someone being held apart from *any* other inmates, as occurred here. Under such circumstances, the detention facility obviously has reduced security concerns than when a new arrestee

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F.2d at 741-42 & n.4 (concluding that it was "well-established" in 1985 that strip-search that included visual inspection of body cavities for person arrested for minor offense was unconstitutional).

is introduced into the general jail population, when smuggling risks are more acute.[7]

Petitioners cannot claim that *Powell* made their constitutional obligations unclear to them on September 1, 2006, because that case was decided two years *after* the search. As the *Powell* court itself noted, *see* 541 F.3d at 1301, Eleventh Circuit precedent in existence in 2006 *supported* the conclusion that petitioners' actions were unconstitutional. *See Wilson v. Jones*, 251 F.3d 1340, 1343 (11th Cir. 2001) (holding that suspicionless strip search of woman arrested for driving under the influence was unconstitutional), *overruled by Powell*, 541 F.3d 1298. As the author of *Powell* wrote in 2005,

> Our circuit law is the same as that of every other circuit to address the issue insofar as those detained on non-felony charges are concerned. Each of the other circuits to speak on the matter has concluded that a person

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[7] Moreover, *many* courts of appeals—including, notably, the court below, *see* Pet. App. 26a—have long considered an arrestee's introduction into a jail's general population as a factor that generally supports the reasonableness of strip-searching. *See, e.g., Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1448 (9th Cir. 1991) ("In determining the constitutionality of strip searches of arrestees, courts have distinguished between searches of detainees who were simply awaiting bail, and searches conducted of inmates admitted * * * to the general jail population."); *Logan*, 660 F.2d at 1013. In any event, this Court has recently affirmed that the fact that "a group of judges[] disagrees about the contours of a right" is not alone sufficient as to warrant qualified immunity. *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2643 (2009).

> arrested on a misdemeanor charge may not be strip searched * * * unless there is reasonable suspicion to believe that he is concealing a weapon or other contraband.

Evans v. Stephens, 407 F.3d 1272, 1285 (11th Cir.) (Carnes, J., concurring), *reh'g denied*, 163 Fed. Appx. 850 (11th Cir. 2005). Petitioners thus have no entitlement to qualified immunity. *See Hope v. Pelzer*, 536 U.S. *730, 741 (2002)* ("the salient question [for qualified immunity] is whether the state of the law" at the time of the incident gave officials "fair warning that their alleged treatment * * * was unconstitutional").[8]

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[8] Petitioners are mistaken (Pet. 16) that the decision below conflicts with *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003), in which the court upheld under the Fourth Amendment a program under which prisoners exchanged their street clothes for prison uniforms while being observed by a same-sex officer. However, that case involved a less significant intrusion on privacy because, as the court repeatedly emphasized, prisoners were allowed to continue wearing their undergarments, *see id.* at 962, 963, 965, 966. And in contrast to petitioner James' "visual[] inspect[ion] [of] Ms. Myers' naked body," Pet. App. 23a, the observation in *Stanley* did not "extend[] beyond monitoring the clothing exchange." 337 F.3d at 965. Thus, "[t]he intrusion involved in this particular clothing exchange is * * * distinguishable from the more intrusive searches" of the sort at issue here. *Id.*

Petitioners also contend (Pet. 21) that the decision in *Serna v. Goodno*, 567 F.3d 944 (8th Cir.), *cert. denied*, 130 S. Ct. 465 (2009), reflects confusion about the rationale in *Wolfish* because the *Serna* court stated in passing that there was "some unarticulated level of individualized suspicion" sufficient to justify the search because of the inmates' contact visits with outsiders. The court of appeals' effort to discuss *Wolfish* in the familiar terms of individualized suspicion does not suggest a

2. Petitioners are mistaken in contending (Pet. 7-12) that the decision below conflicts with *Bell v. Wolfish*, because that case involved drastically dissimilar security considerations. The Court there held that the Fourth Amendment permitted a blanket policy of performing visual body-cavity inspections of inmates at a federal detention center who were returning from contact visits with persons from outside the institution. While the institution in *Wolfish* sometimes housed witnesses in protective custody and persons incarcerated for contempt, 441 U.S. at 524, typically "the detainees were awaiting trial on serious federal charges after having failed to make bond." *Mary Beth G.*, 723 F.2d at 1272. Those circumstances are a far cry from strip-searching "minor offenders who [are] not inherently dangerous and who [are] being detained only briefly while awaiting bond." *Id.*; *accord Jones v. Edwards*, 770 F.2d at 741-42 (distinguishing *Wolfish*).

"Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something." *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001), *cert. denied*, 537 U.S. 1083 (2002); *accord Roberts v. Rhode Island*, 239 F.3d 107, 111 (1st Cir. 2001) (noting "the essentially unplanned nature of an arrest" and stating "it is far less likely that smuggling of contraband will occur subsequent to an arrest (when the detainee is

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need for further review. In any event, "'[t]his Court reviews judgments, not statements in opinions.'" *Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam)).

normally in handcuffed custody) than during a contact visit that may have been arranged solely for the purpose of introducing contraband"); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) (per curiam) (noting that arrest is usually an "unplanned event[]"), *cert. denied*, 471 U.S. 1053 (1985), *overruled in part on another ground by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc). Thus, "the security concerns inherent in a bail situation are very different" from those at issue in *Wolfish*. *Cottrell v. Kaysville City, Utah*, 994 F.2d 730, 735 (10th Cir. 1993). It would "misread *Wolfish*" to construe that case to hold that the Fourth Amendment permits strip searches of all persons detained regardless of the nature of their offenses. *Weber v. Dell*, 804 F.2d 796, 800 (2d Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987).

3. As petitioners note (Pet. 17-18), the Court of Appeals for the Ninth Circuit has granted rehearing en banc on the issue of "whether a blanket policy of strip searching without reasonable suspicion * * * all individuals arrested and classified for housing in the general jail population violates the arrestees' clearly established constitutional rights." *Bull v. City & County of San Francisco*, 539 F.3d 1193, 1194 (9th Cir. 2008), *reh'g en banc granted*, 558 F.3d 887 (9th Cir. 2009). If the Court wishes at some point to address the question raised by the petition, it would benefit from having the considered views of another en banc court. Further review in this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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